IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1809

JOHN L. SCOTT,

Appellant

v.

JOHN D. BENN, JR.,
RICHARD A. BACAS, Trustee
THEODORE L. GRAY, Trustee,

Appellees

APPEAL FROM THE SUPREME COURT
OF THE
COMMONWEALTH OF VIRGINIA

JURISDICTIONAL STATEMENT

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Appellant

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NOTICE OF APPEARANCE

Please take notice that I enter my appearance in this action as counsel for Appellant this 20 day of June, 1977.

Rose F. Thompson

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INTRODUCTION

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, John L. Scott, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment or order entered by the Supreme Court of Virginia in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The Supreme Court of Virginia rejected the Appellant's petition for appeal, thereby affirming the order of the Circuit Court of Prince William County appealed from, which held that Section 55-59(6) of the Code of Virginia, as amended did not contravene the due process clause of the fourteenth amendment of the Constitution of the United States insofar as said due process clause extends to notice requirements in a foreclosure proceeding to all persons with property rights in the common property secured by Deeds of Trust, including the respective

rights of senior lienholders, junior lienholders, both resident and nonresident, and also as to the respective rights of parties holding notes of equal dignity secured by the same Deed of Trust. This case has not been the subject of an opinion below, reported or unreported.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action in chancery for declaratory judgment and injunctive relief (subsequently amended to expand the grounds of relief sought) challenging the legality of an advertised foreclosure sale of 66 acres of land, more or less, located in Virginia, and impressed with Deeds of Trust secured by a series of promissory notes. The final order of the Supreme Court of Virginia of February 24, 1977, had the effect of affirming the order of the Circuit Court of Prince William County entered on April 7, 1976, which upheld the constitutionality of the notice provisions of the foreclosure statute. A timely notice of appeal to the United States Supreme Court

was filed on March 23, 1977, in the Supreme Court of the Commonwealth of Virginia, and on March 22, 1977, in the Circuit Court of Prince William County, Virginia. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257(2).

Cases that sustain the jurisdiction of this Court include decisions addressing the constitutionality of state statutory provisions regarding notice under the fourteenth amendment to the Constitution of the United States, after a final ruling on the question by the state's highest court, Schroeder v. City of New York, 371 U.S. 208 (1962); Travelers Health Association v. Commonwealth of Virginia, 339 U.S. 643 (1950).

STATUTE INVOLVED

The constitutionality of Va. Code Ann. § 55-59(6) (1974) (1976 Supplement) is challenged herein. Section 55-59 provides:

> § 55-59. How deed of trust construed; duties, rights, etc. of parties.

> Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:
>
> (1) The deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation.
>
> (2) The grantor shall be deemed to covenant that he will pay all taxes, levies, assessments and charges upon the property, including the fees and charges of such agents or attorneys as the trustee may deem advisable to employ at any

time for the purpose of the trust, so long as any obligation upon the grantor under the deed of trust remains undischarged.

(3) The grantor shall be deemed to covenant that he will keep the improvements on the property in tenantable condition, whether such improvements were on the property when the deed of trust was given or were thereafter placed thereon.

(4) The grantor shall be deemed to covenant that no waste shall be committed or suffered upon the property.

(5) The grantor shall be deemed to covenant that in the event of his failure to meet any obligations imposed upon him then the trustee or any beneficiary may, at his option, satisfy the same; and the money so advanced, with the interest thereon shall be a part of the debt secured by the deed, in the

event of sale to be paid next after the expenses of executing the trust, and shall be otherwise recoverable from the grantor as a debt.

(6) In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and may take possession of the property and proceed to sell the same at auction at the premises or at such other place in the city or county in which the property or the greater part thereof lies, or in the corporate limits of any city surrounded by or con-

tiguous to such county, or in the case of annexed land, in the county of which the land was formerly a part, as the trustee may select upon such terms and conditions as the trustee may deem best, after first advertising the time, place and terms of sale in such manner as the deed may provide, or, if none be provided, the trustee shall advertise the time, place and terms of sale once a week for four successive weeks in a newspaper published or having general circulation in the county or city in which the property or some portion thereof is located and may sell such property on the twenty-second day after the first advertisement or any day thereafter. It is not intended, however, to declare that other and different advertisement may not in any case be deemed reasonable, nor to prevent the trustee from

giving the sale such additional advertisement as he deems advisable. The trustee or party secured shall give written notice of such proposed sale by personal delivery, or by certified or registered mail to the present owner of the property at his last known address, as such owner and address appear on the records of the party secured. Mailing a copy of the advertisement or a notice containing the same information fourteen days prior to such sale shall be a sufficient compliance with the requirement of notice. Failure to comply with the requirements of notice shall not affect the validity of the sale under the deed of trust, and the purchaser shall be under no duty to ascertain whether such notice was validly given. The written notice of proposed sale when given as provided herein shall be deemed an effective exercise of any

right of acceleration contained in such deed of trust, or in any evidence of indebtedness secured by such deed of trust, or otherwise possessed by the holder relative to the indebtedness secured. Any sale of property held less than twenty-eight days after the date of the first publication made prior to July one, nineteen hundred sixty, in substantial conformity herewith is hereby validated.

(7) If the property or some portion thereof is located in a city, or in a county immediately contiguous to a city of the first class, publication of the advertisement five different times in any newspaper published or having general circulation in such city or county (the last insertion if desired on the day of sale), shall be deemed adequate; it not being intended, however, to declare that other and different

advertisement may not in any case be deemed reasonable, nor to prevent the trustee from giving the sale such additional advertisement as he may deem advisable. The advertisement and sale of property made prior to January one, nineteen hundred fifty-six, in substantial conformity herewith is hereby validated.

(8) If the deed of trust itself provides a method of advertising, which may be done by using the words "advertisement required," or words of like purport, followed by the method agreed on, then no other or different advertisement shall be necessary, beyond what the deed calls for, though the trustee may, in his discretion, give further advertisement.

(9) The trustee may postpone the sale at his discretion, in such case giving such notice

by advertisement of such postponement as he may deem reasonable, and, without meaning to declare any other method unreasonable, when the advertisement is by publication in a newspaper the continuation thereof in subsequent issues of such newspaper with a note of such adjournment appended shall be deemed adequate of contrary provision in the deed of trust.

(10) The trustee may require of any bidder at any sale a cash deposit of as much as ten percentum of the sale price (unless the deed of trust specifies a different maximum, which may be done by the words "bidder's deposit of not more than . . . dollars may be required," or words of like purport), before his bid is received, which shall be refunded to the bidder unless the property is sold to him, otherwise to be applied to

his credit in settlement or, should he fail to complete his purchase promptly, to be applied to pay the costs and expense of sale and the balance, if any, to be retained by the trustee as his compensation in connection with that sale.

(11) If any sale be upon credit terms the deferred purchase money shall bear interest from the day of sale and shall be secured by a deed of trust upon the property contemporaneous with the trustee's deed to the purchaser.

(12) The clerk of the court upon admitting to record the deed of such trustee conveying property held in trust shall note a reference to same on the margin of the deed book where the deed or other writing conveying the property to such trustee in trust is recorded, if the same can be found in his

office.

(12a) The purchaser for value of the property may rely on a recital in the trustee's deed as to compliance by the trustee with the provisions of paragraph (6) hereof requiring service of notice of the sale on the grantor or his successor in title.

(13) The trustee shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same, first, to discharge the expenses of executing the trust, including a commission to the trustee of five per centum of the gross proceeds of sale; secondly, to discharge all taxes, levies, and assessment, with costs and interest, including the due pro rata thereof for the current year; thirdly, to discharge in the order of their priority, if any, the remaining debts and obligations secured

by the deed, and any liens of record inferior to the deed of trust under which sale is made, with lawful interest; and fourthly, the residue of the proceeds shall be paid to the grantor or his assigns; provided, however, that the trustee as to such residue shall not be bound by any inheritance, devise, conveyance, assignment or lien of or upon the grantor's equity, without actual notice thereof prior to distribution.

(14) Upon discharge of all the debts, duties and obligations imposed by the deed upon the grantor's request the trustee shall execute and deliver a good and sufficient deed of release at the grantor's own proper costs and charges.

Any sale of property located in a city, made under a deed of trust after first advertising the time, place, and terms of

sale once a week for four successive weeks in a newspaper published or having general circulation in such city, is validated, provided such sale was otherwise conducted according to law. (Code 1919, § 5167, 1922, p. 364; 1926, p. 591; 1940 p. 879; 1944, p. 481; 1952, c. 370; 1954, c. 557; 1956, c. 674; 1960, c. 5; 1964 c. 501; 1968, c. 786; 1970, c. 12; 1973, c. 341; 1976, c. 257.

QUESTION PRESENTED

Did the Supreme Court of Virginia err in affirming the lower Court's holding that V.C.A. Section 55-59(6) as amended, does not contravene the due process clause of the fourteenth amendment of the Constitution of the United States of America, insofar as said due process clause extends to notice requirements in a summary foreclosure proceeding to all persons with property rights in the common property secured

by a Deed of Trust, or Deeds of Trust, including persons who may be liable for the debt, and also including the respective rights of senior lienholders, junior lienholders, resident and non-resident and also as to the respective rights of parties holding notes of equal dignity secured by the same Deed of Trust?

STATEMENT OF THE CASE

Appellant brought suit in chancery for declaratory judgment and injunctive relief challenging the legality of an advertised foreclosure sale of real property. The federal question of the constitutionality of the foreclosure statute's notice provisions under the fourteenth amendment was raised in the pleadings in Chancery No. 8379 in the court of first instance, the Circuit Court of Prince William County. The Circuit Court, by order of April 23, 1975, held that the notice provisions did not violate the federal constitution, and the Supreme Court of Virginia, by denying a petition for appeal, affirmed the final

order of the Circuit Court in Chancery No. 8370. The sole issue for the United States Supreme Court is whether the notice provisions of the Virginia mortgage foreclosure statute are constitutional or not.

SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents important and substantial questions of federal law. The Virginia statute in question, Va. Code Ann. § 55-59, constitutes state action which brings the fourteenth amendment into play to require notice under the requirements of due process.

A number of decisions have found no state action in statutes which recognize and regulate extrajudicial mortgage foreclosure proceedings, but these cases are distinguishable. Kenly v. Miracle Properties, 412 F. Supp. 1072 (D. Ariz. 1976); Northrip v. Federal National Mortgage Association, 527 F.2d 23 (6th Cir. 1975); Barrera v. Security Building and Investment Corp., 519 F.2d 1166 (5th Cir. 1975); Roberts v. Cameron-Brown Co., 410 F. Supp. 988 (S.D. Ga. 1975); Lawson v.

Smith, 402 F. Supp. 851 (N.D. Cal. 1975); Armeta v. Nussbaum, 519 S.W.2d 673 (Tex. Civ. App. 1975); Federal National Mortgage Association v. Howlett, 521 S.W.2d 428 (Mo. 1975), app. dismissed, 423 U.S. 909 (1975); Hoffman v. United States, Department of Housing and Urban Development, 371 F. Supp. 576 (N.D. Tex. 1974), aff'd, 519 F.2d 1160 (5th Cir. 1975); Bryant v. Jefferson Federal Savings & Loan Association, 509 F.2d 511 (D.C. Cir. 1974); Global Industries, Inc. v. Harris, 376 F. Supp. 1379 (N.D. Ga. 1974); Law v. United States Department of Agriculture, 366 F. Supp. 1233 (N.D. Ga. 1973).

The statutes dealt with in each of these cases recognized the validity of extrajudicial foreclosure sales and regulated certain aspects of such sales. The courts in the above cases found no state action because the power of sale was not created by statute but was created by private contract. See, e.g., Northrip, supra. In Federal National Mortgage Association v. Howlett, supra, no state action was found because:

The power of sale exercised by the trustee was not derived from the statute nor granted by the state. It is a contractual right established by the power of sale provision in the deed of trust. That instrument, a contract executed by the parties, specifically provided for extra-judicial foreclosure. The contractual nature of such power of sale has been recognized repeatedly in decisions in this state. (Citations omitted).

Analysis of the language of the statutory sections cited by appellant confirms the correctness of this view. Section 443.290 (R.S. Mo.) neither compels the inclusion of a power of sale in a mortgage or deed of trust nor has the effect of inserting such a clause when not put therein by the parties. It simply recognizes the validity of such provisions. . . .

521 S.W.2d at 432. In the Virginia statute, however, the statute itself creates the power of sale. Because the Virginia statute is the source of the power of extrajudicial mortgage forclosure sales, such sales constitute state action in Virginia. As the court stated in the Law case, supra:

> If the challenged statute were one which provided that any security interest holder could upon default by the debtor invoke the summary procedure, the unconstitutionality would be apparent. Plaintiff's equity interest in the land and the right to its "use" would constitute property entitled to procedural due process. Fuentes v. Shevin, 407 U.S. 67, 84, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969). The usual requisites of procedural due process are notice and a prior hearing. Sniadach v. Family

Finance Corp., 395 U.S. 337, 342, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) (Harland, J., concurring). To satisfy due process, notice "must be such as is reasonably calculated to reach interested parties." Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 318, 70 S. Ct. 652, 659, 94 L. Ed. 865 (1950). Absent a showing that defendants could not give plaintiff personal notice, newspaper notice would not be "reasonably calculated" to reach plaintiff. Although the form of the hearing required may vary according to the nature of the case, Fuentes, supra, 407 U.S. at 82, 92 S. Ct. 1983, the hypothetical statute would afford no opportunity for hearing at all and consequently would be clearly unconstitutional. E.g., Johnson v. Glenn's Furniture Company, Inc., No. 16089 (N.D. Ga. 1972) (Three-judge) (Personal property foreclosure); Mason v. Garris, 360

F. Supp. 420 (N.D. Ga. 1973) (Three judge) (foreclosure of liens).

This Georgia statute, however, unlike the personal property foreclosure acts, does not itself create any rights in creditors.

366 F. Supp. at 1238.

The Virginia statute is the hypothetical statute referred to by the court in Law. Section 55-59 provides:

Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:

. . .

(6) In the event of default in the payment of the debt

> secured, . . . then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and may take possession of the property and proceed to sell the same at auction. . . .

Thus, unlike the cases cited above, the present case involves state action because the Virginia statute not only recognizes the validity of the extrajudicial sales and regulates them, but imposes the term creating such power in every deed of trust relating to Virginia real estate unless the deed of trust provides otherwise.

A further basis for finding state action is addressed in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), on the basis of a statute similar to the Virginia statute at issue here. The court in Turner stated:

> While the state has left to the trustee the functions of giving notice and conducting the public

> auction, the essentials thereof are subject to explicit verification by the clerk under [N.C. G.S.] § 45-21.26. Contrary to defendants' characterization this is not merely an empty ritual; we take the state at its word when it has vested the clerk with contempt power to enforce a failure timely to file a complete and correct report. . . .

389 F. Supp. at 1256. The Virginia provision challenged here is backed up by the contempt power. By virtue of Va. Code Ann. § 26-15 (1973), the trustee making a foreclosure sale must file an account of sale with the Commissioner of Accounts. Such Commissioners are appointed by the judge of the circuit court under Va. Code Ann. § 26-8 (1976 Supp.), and the requirement that the trustee under a deed of trust file his account of sale under V.C.A. § 26-15 is backed up by the power of the Commission to issue summons and ultimately by the contempt power of the court under

Va. Code Ann. § 26-13 (1973). Therefore, state action should be found in the present case as it was in Turner.

Given the state action, the violation of the fourteenth amendment for failure to give notice, becomes apparent. The Virginia statute provides for sale,

> after advertising the time, place and terms of sale in such manner as the deed may provide, or if none be provided, the trustee shall advertise the time, place and terms of sale once a week for four successive weeks in a newspaper published or having general circulation in the county or city in which the property or some portion thereof is located.
> . . .

V.C.A. § 55-59(6). The statute also purports to require that written notice be given by personal delivery or certified registered mail to the present owner of the property at his last known address.

This "requirement" is stated, but immediately withdrawn by the statute. In one sentence, the statute requires notice to the present owner by personal delivery or by certified or registered mail and in the following sentence the content of the notice is specified. In the next sentence, the notice "requirement" is in effect voided, because the statute then states that:

> Failure to comply with the requirements of notice shall not affect the validity of the sale under the deed ot trust, and the purchaser shall be under no duty to ascertain whether such notice was validly given.

V.C.A. § 55-59(6). Thus, while there is an illusory "requirement" that notice be given to the present owner, there is not even a colorable requirement that written notice be given to all other persons who are or may be liable for any part of a deed of trust debt, nor to

all persons holding notes secured by a deed of trust. Thus in the present case, the statute fails to require that notice be given to lienors of record such as the heirs of Stoneburner and the holders of Notes 2, 3, and 4. The failure to afford notice to persons with such interests in the proceedings deprives them of a substantial property right, their security interest in the property without notice, and subjects the appellant to a potential multiplicity of suits by lienors who received no legal notice of the proceedings.

As this Court has stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process.

> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected. . . .

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 at 314-15 (1950).

With specific reference to notice by publication, the Court continued:

> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on

process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

339 U.S. at 315.

It was concluded in Mullane that notice by publication was insufficient to meet due process requirements to the extent

that the trustee of a common trust fund had at hand the names and post office addresses of beneficiaries who were entitled to notice of the trustee's petition for judicial settlement of its account. Rather than mere notice by publication, those beneficiaries were, at a minimum, entitled to notice by ordinary mail.

This Court's antipathy for notice by publication appeared again in Schroeder v. City of New York, 371 U.S. 208 (1962), where the notices of a condemnation proceeding were both published in newspapers and posted on trees and poles in the general vicinity of the plaintiff landowner's property in January (while plaintiff occupied the property only in July and August). The notices did not contain the plaintiff's name, nor were any of them posted on her property. There it was said:

> The general rule which emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known to a person whose name and address are known or very easily ascertain-

able and whose legally protected interests are directly affected by the proceedings in question.

371 U.S. at 212-13. Thus, because the plaintiff's name and address were readily-ascertainable from both deed records and tax rolls, notice by publication was ineffective as against the plaintiff. Schroeder is particularly compelling here, as the trustee under the deed of trust could easily obtain the names and addresses of all lienors of record from the deed records. All lienors are directly effected by the foreclosure sale as it impairs their security interest.

The Mullane and Schroeder cases were followed in Ricker v. United States, 417 F. Supp. 133 (D. Me. 1976), where notice by publication was held insufficient in the context of an extrajudicial mortgage foreclosure.

Moreover, in Schroeder one of the factors noted by this Court was that the publication was made in small communities in the same county as the property was located, but many miles from it, although

at the time there were papers published in nearby larger towns in the county. In the instant case, publication was made in the Journal Messenger, a small paper published in Manassas, Virginia. Although Manassas is the county seat of Prince William County, it is only a small part of the metropolitan area of Washington, D.C. If one truly desired to inform interested persons of the proposed sale of real estate in the Washington area, he would seem more likely to employ the medium of the Washington Post or Washington Star with their much larger circulation throughout the metropolitan area, of which Manassas comprises only a small part. Also, there are many military families in the Washington-Northern Virginia area. Such families are likely to come into the area and purchase a home on a deed of trust, and after a short span of time find themselves transferred out of the area altogether. They are likely to sell their home to a new buyer who assumes their deed of trust, the military family remaining liable on it should the new buyer default. In the event that the new buyer does default,

it is incredible to argue that they would receive notice of the foreclosure sale by means of an advertisement in the small Journal Messenger. On the other hand, there is at least a greater possibility that a family which has left the area might still see the Washington Post or Star. Certainly if the person placing the advertisement desired to inform the absentee of the foreclosure sale, he would use one of the most prominent papers with the largest circulation in the area, and not one of the small local papers.

Thus, Mullane and Schroeder teach that the form of notice given in the instant case was insufficient to meet due process requirements because it offered no reasonable possibility that persons with interests in the property other than the present owner would learn of the sale, and the notice received by the present owner was merely due to the good graces of the trustee and was not compelled by the statute.

Attention is directed to Sniadach v. Family Finance Corporation of Bay View,

395 U.S. 337 (1969), which held that notice and a hearing must be given to a wage earner before his wages may be garnished. The court invalidated the Wisconsin statute allowing a garnishor to give notice to the wage earner of the freeze on his wages within 10 days after the wages are frozen by service of a summons on the garnishee. Sniadach marked the beginning of a line of precedent which now requires that notice and an opportunity to be heard be provided to persons prior to their being deprived of any substantial property interest, even temporarily, by extrajudicial procedure.

The next major case in the Sniadach line was Fuentes v. Shevin, 407 U.S. 67 (1972), reh. denied, 409 U.S. 902 (1972), which struck down the Florida and Pennsylvania replevin statutes. The statutes provided for a summary procedure under which anyone could come in claiming a right to property and thereby cause a writ to issue for the seizure of property without giving the possessor of the property any right to notice or hearing prior to the

seizure. The claimant was not required to make a convincing showing of his right to the property prior to the issuance of the writ. Fuentes involved seizures pursuant to claims of creditors who had sold chattels to consumers on installment plans and replevied the chattels upon claims that the consumers had defaulted in their payments. It was noted, however, that, "Any significant taking of property by the State is within the purview of the Due Process Clause." 407 U.S. at 86. Moreover, the protection of the Due Process Clause extends to any significant property interest, including in Fuentes the interest of persons who did not have full legal title to the chattels at issue. 407 U.S. at 86.

Fuentes was followed by Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), which also involved a summary seizure (by sequestration) of consumer goods sold under an installment plan. The result was the opposite from Fuentes, which was distinguished, on the basis that in Fuentes

the writ issued from a clerk upon the claimant's conclusory assertion of right to the property, whereas in Mitchell, the order for sequestration, although ex parte in nature, issued from a judge and only after a showing of the nature of the claim, its amount, and the grounds relied upon, for the issuance of the writ. Moreover, the Mitchell decision stresses the constant depreciation of the chattel while used by its possessor, the possibility of concealment of the chattel, and the possibility of its transfer (which under Louisiana law would cause the vendor's lien to expire). None of these factors has any weight in the instant case dealing with real estate, as the realty is not subject to depreciation, possible concealment or the destruction of the security interest in the event the property were transferred.

The continuing vitality of Fuentes has been assured by North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975), which found unconstitutional the Georgia statute allowing garnishment upon the presentation of an affidavit stating a

claim in conclusory terms by the claimant or his attorney to a clerk of court. There a corporate bank account was garnished. The same factors which distinguished Mitchell from Fuentes were looked to in North Georgia Finishing and on the basis of those factors this Court found that the Fuentes case, and not Mitchell, was apposite.

North Georgia Finishing makes it clear that the right to notice and hearing applies to the deprivation of any type of property interest, stating:

> It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among different

> kinds of property in applying the Due Process Clause. Fuentes v. Shevin, 407 U.S. at 89-90, 92 S. Ct. at 1998-1999.

419 U.S. at 608.

It would seem indisputable that the protection afforded wages, bank accounts and chattels under Sniadach, North Georgia Finishing, and Fuentes, accrues also to real property. Compare, Schroeder, supra. Indeed, the Sniadach line of cases has been applied to hold unconstitutional a mortgage foreclosure statute in Turner v. Blackburn, supra. The North Carolina statute dealt with there provided for notice to the mortgagor by posting on the courthouse door for 30 days and publication in a newspaper published or generally circulating in the county where the land is situated. There was no requirement that any showing be made before a clerk or other neutral official that the mortgagor is in default prior to the sale. The only "relief" presented to the mortgagor was the opportunity to submit an upset bid, which does not constitute a hearing, and a hear-

ing prior to eviction, but subsequent to the sale, the distribution of the proceeds and the recording of the deed. The court stated:

> Finding the later "hearings" insufficient, and perceiving no countervailing reasons for delay, we hold that a hearing prior to foreclosure and sale is essential. Fuentes v. Shevin, supra.[1]

389 F. Supp. at 1259.

The resolution of the present case, like Turner, should be guided by Fuentes and North Georgia Finishing. There is no urgency in foreclosing a deed of trust.

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[1] The court continued:

> In Mitchell v. W.T. Grant, supra, the Court declined to graft a rigid requirement of prior notice and hearing upon the state's procedure for sequestration of installment goods upon the vendor's ex parte application. Balancing the seller's risks against the relatively low-risk, short-lived deprivation suffered by the debtor, the Court found that Louisiana had reached a "constitutional accommodation." 416 U.S. at 610, 94 S. Ct. 1895. Defendants have cited no substantial prejudice which they would suffer here if prior notice were provided, nor, given that foreclosure takes at least approximately 45 days, do we perceive any need to move quickly before the mortgagor is notified, as in Mitchell. See North Georgia Finishing, Inc. v. Di-Chem, Inc. 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975). . . .

Real property is not subject to concealment and the rights of the parties under a recorded deed of trust cannot be defeated by alienation of the property. Additionally, real property is not necessarily subject to depreciation from use as is a chattel. Certainly the vacant land which is the subject of the present controversy is not subject to depreciation through use. The above factors place the present case within the rules of Fuentes and North Georgia Finishing and distinguish the present case from Mitchell.

Actually, the procedure provided in the present case is more deficient than in any of the Sniadach line of cases.

Mitchell teaches that if a presentation by affidavits is made to a judge of facts which show a basis for a claim, summary procedures to seize property may be invoked. However, Fuentes and North Georgia Finishing make it clear that summary procedures may not be invoked upon a showing by affidavit made to a clerk of a merely conclusory claim to property. The Virginia statute does not require any showing of even a conclusory claim to either judge or clerk. The state has enacted a statute which places a power of sale in every Virginia deed of trust, so that the state is the very genesis of the power (which, as discussed above constitutes an exercise of state power to which the fourteenth amendment applies). Having created the power and mandated its presence in deeds of trust, unless the deed provides otherwise, the state then abandons the power by placing its exercise entirely in the hands of the beneficiaries and trustees of deeds of trust. In the event of default a beneficiary has only to request the trustee to declare all the debts due and to proceed to sell the premises. No showing

of any factual basis for the foreclosure is required to be made to any judicial officer before or after the sale. Minimal due process requires notice and an opportunity to be heard. Ricker v. United States, supra. In Ricker, the Farmers Home Administration had foreclosed a mortgage under the extrajudicial procedures available under Maine law. The mortgagors were notified of the acceleration of the indebtedness and a demand for payment, and foreclosure was threatened if payment was not received by a certain date. The court held that this threat did not constitute notice that foreclosure proceedings would be instituted, and held the notice by publication which was given to have been insufficient to provide constitutional due process. The court went on:

> More importantly, this "Notice of Acceleration" made no pretense of extending the Rickers any opportunity to challenge the decision to institute foreclosure proceedings.

417 F. Supp. at 138.

The court acknowledged that although the formality and procedural requisites of a constitutionally mandated hearing may vary, there must be a meaningful and timely opportunity to be heard. However, the court noted:

> The Rickers were offered no opportunity for hearing, and no hearing was held before their mortgage was foreclosed.
>
> The Government argues that any opportunity to be heard would be mere surplusage in the context of a mortgage foreclosure. The issues are open and shut: the existence of overdue debt and of a valid mortgage agreement. But this argument must fail, for two reasons. First, the simplicity of the legal issues and the improbability of any colorable challenge to the Government's position does not of itself dispel the need that the party affected have an opportunity to be

> heard before a final deprivation takes place. (Citations omitted). Second, the Rickers have brought forward challenges
>
> . . . .

417 F. Supp. at 139.

The same situation obtains in the present case as in Ricker. Both failure of notice and of an opportunity to be heard have been unconstitutionally denied to your petitioner.

The Virginia statute recognizes the rights of other lienors of records in V.C.A. § 55-59(13) which sets out the proper priority for distribution of the proceeds of the sale. This list of distribution priorities includes junior lienors of record, and judicial supervision is exercised under Va. Code Ann. § 26-15 (1975) to ensure that the proceeds are in fact distributed as directed. However, no notice to junior lienors of record is ever required so as to allow them to assert their claims.

It should also be noted that since the trustee must make a distribution to

junior lienors (which, similarly to Schroeder, supra, should be easily done from the deed records). There being no great urgency in affecting the foreclosure sale, there would appear to be no conceivable reason why the trustee should not ascertain the location of the junior lienors of record prior to the sale and give them notice before the sale is made so that they may appear and protect their security interest in the property. Yet the trustee is not required to do so by the statute in question. Therefore, the Virginia statute, V.C.A. § 55-59(6), violates the fourteenth amendment because it affords neither notice nor hearing at any point to junior lienors of record or to any other persons with interests in the property except for an illusory "requirement" that notice be given to the present owner, and there is not even any pretense that the present owner be afforded a hearing.

The constitutional infirmity is injurious to your petitioner, because although he did receive notice by certified mail, he is exposed to a multiplicity of suits from other lienors of record; the heirs of Stone-

burner and the holders of notes 2, 3, and 4. Thus, the failure to give adequate notice to those parties may be raised by your petitioner. The deed of trust involved here did not require notice to be given to your petitioner and merely parrotted the language of the statute, V.C.A. § 55-59(6), supra, as regards notice by publication. Therefore, the deed of trust was ineffective to cure the constitutional defects of the statute.

The Virginia statute, as discussed above, is violative of the Due Process Clause, but has been upheld by the order of the Supreme Court of Virginia of February 24, 1977, which found no reversible error in the Circuit Court's order. Thus jurisdiction is properly had under 28 U.S.C. § 1257(2) (1970). Schroeder, supra; Travelers Health Association, supra.

The substantiality of the question may be seen in the facts and law, but attention is also directed to Pedowitz, "Current Developments in Summary Foreclosure," 9 Real Property, Probate and Trust

Journal 421 (1974), which reflects the uncertain status of the validity of summary mortgage foreclosure procedures in the wake of Sniadach and its progeny. This uncertainty should be settled.

CONCLUSION

For the reasons stated above, appellant respectfully submits that this appeal presents to this Court a substantial and important federal question which requires plenary consideration, with briefs on the merits and oral argument for their resolution.

APPENDIX A

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

Held at the Supreme Court Building in the City of Richmond

On Thursday the 24th day of February, 1977

The petition of John L. Scott for an appeal from an order entered by the Circuit Court of Prince William County on the 7th day of April, 1976, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and John D. Benn, Jr., and others were defendants, having been maturely considered and a transcript of the record of the order aforesaid seen and inspected, the court being of opinion that there is no reversible error in the order appealed from, doth reject said petition, and refuse said appeal, the effect of which is to affirm the order of the said circuit court.

Record No. 761019

A copy,

Teste:

Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN L. SCOTT,

Petitioner

v. In Chancery No. 45411

BANK OF VIRGINIA-POTOMAC, et al.,

Defendants

DECREE

THIS CAUSE came to be heard on Friday March 21, 1975, for a hearing on the temporary injunction awarded ex parte on Monday, March 17, 1975, upon the pleadings and papers formerly filed in this cause.

Based upon the evidence presented by the Petitioner and the argument by counsel for Petitioner and Defendants, it was

ADJUDGED, ORDERED and DECREED that:

1. The order for a temporary injunction entered on March 17, 1975, is hereby dissolved.

2. The Notice of Trustees' Sale for the foreclosure of the Deed of Trust recorded in Deed Book 4066 at Page 440

among the land records of Fairfax County, Virginia be re-advertised.

3. Such re-advertisement shall satisfy the complaints of insufficiency raised in the Bill for Injunction, consistent with law; however, there is no finding by this Court that the previous Notice of Trustees' Sale did not comply with applicable law.

4. Legal notice of said sale be given to the Co-obligors of the two Deeds of Trust senior to the Deed of Trust being foreclosed, to wit: Loren L. Thompson, Rose F. Thompson, and Elisabeth M. Scott, at their last known addresses.

5. The Court will not rule on the constitutionality of the Virginia statute pertaining to Notice Requirements in the foreclosure of a Deed of Trust.

Entered: 3/28/75 S. Perry Thornton
Judge

FRIED, FRIED, & KLEWANS

Barbara J. Fried
The Executive Building
P.O. Box 215
Springfield, Virginia 22150
Counsel for Defendants

SEEN AND EXCEPTED TO AS TO ENTIRE DECREE:

John L. Scott, Petitioner
In Proper Person
P.O. Box 158
Springfield, Virginia 22150

Rose F. Thompson
6909 Edgebrook Drive
Springfield, Virginia 22150
Counsel for Petitioner

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

JOHN L. SCOTT,
Petitioner

v. CHANCERY NO. 8370

JOHN D. BENN, JR.,
RICHARD A. BACAS,
Trustee, and
THEODORE L. GRAY,
Trustee,
Defendants

ORDER

This cause came on to be heard on the 2nd and 9th days of April 1975, upon the Petition and Amended Petition of the Petitioner for a Declaratory Judgment, for Injunctive and other relief; and upon the other pleadings and papers filed in the cause; and after hearing testimony and argument of counsel, the Court is of the opinion and does hereby find:

(1) The Section 55-59(6) of the Code of Virginia, as amended, is constitutional, and does not contravene the due process clause of Article 1, Section 11 of the

Constitution of Virginia or the due process clause of the Fourteenth Amendment (XIV) to the Constitution of the United States of America insofar as said due process clauses extend to notice requirements in a foreclosure proceeding to all persons with property rights in the common property secured by a Deed of Trust, or Deeds of Trust, including the respective rights of senior lienholders, junior lienholders, both resident and non-resident, and also as to the respective rights of parties holding notes of equal dignity secured by the same Deed of Trust; and

(2) That the Trustees' failure, which is admitted in the pleadings, to declare forthwith all debts and obligations secured by the Deed of Trust at once due and payable did not violate Section 55-59 (6) of the Code of Virginia, as amended; and

(3) That the Trustees' failure, which is admitted in the pleadings, to declare forthwith all debts and obligations secured by the Deed of Trust at once due

and payable did not violate the provisions of the Deed of Trust; and

(4) That Carl Lynn, Jr., and Martha Lynn, his wife, are the reputed owners of approximately 405 acres of land which adjoins a portion of the southern boundary of the approximately 101 acres conveyed to Petitioner by defendant Benn; and that approximately 66 acres of the 101 acres are the subject of the proposed foreclosure; and

(5) That the said Carl and Martha Lynn have made formal, written claim to approximately five (5) acres of the 101 acres conveyed to Petitioner by defendant Benn; that the defendants Benn, Bacas and Gray have received notice of said claim; and

(6) That said claim constitutes a cloud on the title to the approximately 66 acres which are the subject of the proposed foreclosure; and that this cloud constitutes an impediment to a fair sale and an impediment to a fair execution of the trust; and

(7) That because of said claim and cloud, the exact amounts of the various

debts secured by the Deed of Trust cannot be ascertained; and that this inability to ascertain the exact amounts of the various debts secured constitutes an impediment to a fair sale and an impediment to a fair execution of the trust; and

(8) That before the sale may proceed, this cloud must be quieted; and

(9) That, because of the cloud on the title, and the impediments to a fair sale and the impediment to a fair execution of the trust arising therefrom, an injunction should issue enjoining the proposed foreclosure sale; and

(10) That Petitioner shall post an injunction bond in the amount of Forty Thousand and 00/100 ($40,000) Dollars, with corporate surety approval by the clerk of this Court to protect defendants in the event the injunction was improperly granted;

Now, therefore, IT IS ADJUDGED, ORDERED AND DECREED:

(1) That Defendants John D. Benn, Jr., Richard A. Bacas, Trustee, and Theodore L. Gray, Trustee, be, and they hereby are, enjoined and restrained from

selling at foreclosure the real property owned by Petitioner described in Exhibit G of the Petition; the injunction to be in full force and effect from 4:15 P.M. on April 9, 1975, and shall remain in full force and effect until enlarged, modified or dissolved by this Court.

(2) That a condition of this Order is that Petitioner post a bond before the Clerk of this Court, with corporate surety approval by the Clerk of this Court in the sum of Forty Thousand and 00/100 ($40,000) dollars, conditioned according to law.

(3) And this cause is continued.

Entered: April 23, 1975 _____

Lewis D. Morris
Judge

SEEN AND EXCEPTED TO AS TO
PARAGRAPHS 1, 2, 3, and 10
of the Findings of the Court,
and Paragraph 2 of the Order:

_____

John L. Scott, Petitioner
In Proper Person
P.O. Drawer 158
Springfield, Virginia 22150

SCOTT, BLACKBURN AND CLARY, ESQS.
Attorneys for Petitioner
P.O. Drawer 158
Springfield, Virginia 22150

BY: _____
Rose F. Thompson,
of Counsel

SEEN AND EXCEPTED TO AS TO PARAGRAPHS 5, 6, 7, 8, and 9 and as to the amount of bond required by Paragraph 10, as to Court Order

CLAY, KELLER & GRAY, ESQS.
Attorneys for Defendants
6627 Backlick Road
Springfield, Virginia 22150

BY: _____

APPENDIX D

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

JOHN L. SCOTT,

Petitioner

vs. CHANCERY NO. 8370

JOHN D. BENN, JR.
and
RICHARD A. BACAS and
THEODORE L. GRAY, TRUSTEES,

Defendants

ORDER AMENDING ORDER ENTERED
On March 23, 1976

THIS MATTER CAME ON TO BE HEARD on the 5th day of March, 1976, on the Motion of RICHARD A. BACAS and THEODORE L. GRAY, TRUSTEES, to Dissolve the Injunction heretofore granted in the above styled cause by Order entered April 23, 1975; and

IT APPEARING that by a Boundary Agreement dated August 19, 1975, and recorded in Deed Book 799, at page 84, among the land records of Prince William County, Virginia, Carl S. Lynn, Jr. and Martha Lynn, his wife, have quit-claimed and released

all of their right, title and claim to any land lying within the 104.3 acre tract formerly owned by the said John D. Benn, Jr., and which tract includes the 101 acre tract conveyed by the said John D. Benn, Jr. to Petitioner, John L. Scott, Trustee, and which also includes the approximate 66 acre tract which is described in and conveyed by the Deed of Trust in relation to which this action was brought;

IT IS THEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Injunction entered in this cause on April 23, 1975, be, and the same hereby is, dissolved.

2. That the Injunction Bond of $40,000.00 required of Petitioner as a condition of the Injunction be, and the same hereby is, released provided that the Bond, in the amount of $80,000 required by the order by the Supreme Court of Virginia in its order entered on April 2, 1976, in Chancery No. 8756, be posted with the Clerk of this Court in the manner and within the time stated in said order; otherwise this bond shall remain in full

force and effect.

3. It is further Adjudged, Ordered and Decreed that Petitioner's Motion to Reinstate and Enlarge the Injunction heretofore granted and subsequently dissolved in this cause is hereby denied.

This Order amends the Order entered on March 23, 1976.

This Order is Final.

Entered this 7th day of April, 1976.

_____
Lewis D. Morris, Judge

WE ASK FOR THIS, EXCEPT FOR PARAGRAPH 2, TO WHICH WE EXCEPT.

CLAY, KELLER & GRAY
6627 Backlick Road
Springfield, Virginia 22150

By: _____
Henry S. Clay, Jr., Counsel
for Richard Bacas and
Theodore L. Gray, Trustees

SEEN AND EXCEPTED TO:

SCOTT, BLACKBURN & CLARY
P.O. Drawer 158
Springfield, Virginia

John L. Scott

Rose F. Thompson,
of Counsel

APPENDIX E

DEED OF TRUST

THIS DEED OF TRUST, made this 28 day of December, 1972, by and between JOHN L. SCOTT, TRUSTEE, party of the first part, and RICHARD A. BACAS, of Arlington County, Virginia, and THEODORE L. GRAY, of Fairfax County, Virginia, Trustees, parties of the second part;

W I T N E S S E T H

That the party of the first part does hereby grant and convey, in fee simple and with General Warranty of Title, unto the party of the second part, the following real estate situated in the County of Prince William, State of Virginia, and more particularly described as follows, to wit:

Beginning at a point in the southerly line of Virginia State Route No. 641, a corner to Ridge Development Corporation; thence, along the line of Ridge Development Corporation, S 38° 15' 44" E 1,193.00 feet to a point, a

corner to Lynn; thence along the line of Lynn, S 24° 47' 40" W 1,255.90 feet to a point, a corner to Tillett; thence, along the line of Tillett, N 69° 06' 02" W 844.19 feet to a point in the line of Tillett; thence N 32° 45' 20" E 1,835.56 feet to a point in the southerly line of said Route 641; thence, along the southerly line of said Route 641, the following courses and distances: N 51° 43' 06" E 153.96 feet; N. 55° 39' 50" E 342.75 feet; N 70° 34' 18" E 202.81 feet; N 86° 44' 27" E 273.24 feet; S 80° 06' 15" E 173.41 feet; S 88° 04' 59" E 137.49 feet; S 79° 50' 20" E 325.24 feet; and S 57° 57' 57" E 82.91 feet to the place of beginning, containing 69.923 acres of land, be the same more or less.

LESS AND EXCEPT THEREFROM, HOWEVER, the following described tract,

as shown on a plat prepared by Dewberry, Nealon and Davis, Engineers and Surveyors, dated August, 1970:

Beginning at a concrete monument on the southerly side of Virginia State Route No. 641, thence, continuing with the outline S 88° 14' 54" E 301.16 feet to an iron pipe; thence S 66° 27' 54" E 109.37 feet to an iron pipe; thence S 46° 40' 26" E 1,196.83 feet to an iron pipe, thence S 16° 22' 55" w 130.13 feet to a point; thence, by a subdivision line N 46° 08' 11" W 1,432.64 feet to the point of beginning, containing 3.3533 acres of land, more or less.

The said party of the first part covenants that all awnings, doors and window screens, mantels, cabinets, linoleum, stoves, shades, blinds, mechanical refrigerators, fuel burning system and equipment, water heaters, radiator covers, and

all plumbing, heating, lighting, cooking, ventilating, cooling, air-conditioning, and refrigerating apparatus and equipment, and each and every of the interior improvements and fixtures, movable or immovable of every kind and description, in and upon said land and premises, or used in connection therewith, and all additions and replacements thereto, are and shall be deemed to be fixtures and shall be an accession to the freehold and a part of the realty, and the same are covered by this Deed of Trust and included in the terms "land," "real estate" and "premises" wherever used herein.

IN TRUST to secure payment of the principal sum of Two Hundred Eighty Nine Thousand Six Hundred Twenty Two and 35/100 Dollars ($289,622.35) with interest thereon at the rate of seven (7%) per cent per annum computed from the date hereof, evidenced by four certain promissory notes of even dat herewith, made by the party of the first part and each payable to the order of John D. Benn, Jr., as follows:

Note No. 1 in the sum of $268,115.21
Note No. 2 in the sum of $ 10,753.57
Note No. 3 in the sum of $ 8,602.86
Note No. 4 in the sum of $ 2,150.71

From and after January 1, 1973, maker shall have the right to prepay any or all of said notes in whole or in part, at any time, without premium, penalty or notice.

At any time and from time to time, the party of the first part may submit to the noteholder for his approval and authorization to the Trustees to join in the execution thereof, without curtail of the principal of the indebtedness, a deed or deeds of subdivision or dedication or other documents creating or establishing roads, rights-of-way, streets, curbs, gutters, sidewalks, access easements, common or public areas, water line easements, storm sewer easements, sanitary sewer easements and any other utility easements or rights whatsoever required by any duly constituted governmental agency having jurisdiction over the same as a condition of subdivision or development, to the end that such

easements and rights will be released from the force and effect of this deed of trust. Such approval by the noteholder shall not unreasonably withheld.

The party of the first part, his successors and assigns, shall be entitled to release of part or parts of the hereinbefore described property from time to time upon curtail of the principal of the indebtedness secured hereby at the rate of $5,750.00 for each acre to be so released and payment of all accrued interest on said indebtedness to the date of such curtail. Such curtails when so made shall be distributed pro rata according to original principal sums among all of hereinbefore described notes not paid at the time of curtail. The Trustees are hereby authorized and directed, upon receipt of payments in the proper proportionate sums, duly made out to the several noteholders, or upon receipt of other satisfactory evidence of such proper proportionate payments having been made, and without the necessity of joinder by any of the holders of said notes, to execute, acknowledge and

deliver to the party of the first part, his successors or assigns, such deed or deeds of release as shall be presented from time to time, all at no cost to said Trustees; provided, however, (a) that at the time any such deed of release is presented for execution no default exists with respect to this deed of trust or any of the notes; (b) that the area or areas to be released are defined between lines substantially parallel to each other and substantially parallel to northeast or southwest lines of the above described property and extending from Route 641 in a southeasterly direction to the opposite outline of the property; and (c) that no such release will leave any unreleased property without useable access to a public road. Payments made on each note in curtail of principal for the purpose of releasing land shall be applied toward and deducted from the required periodic payments or payments next coming due.

The party of the first part, his successors and assigns, shall be entitled at any time, and from time to time,

to have the lien of this deed of trust subordinated to the lien or liens of a deed or deeds of trust conveying part or parts of the above described property for the purpose of securing a land development or construction loan or loans, provided, however, that with respect to any part of the land hereby conveyed this deed of trust shall not be reduced to a position less than a second deed of trust, and that the use and application of the proceeds of any such land development or construction loan is limited to costs directly related to the improvement of the lands conveyed hereby or some part thereof, including, but not necessarily limited to, engineering fees, architectural fees, erection of houses, buildings and other structures, and the on-site and off-site development of roads, streets, curbs, gutters, storm sewers, sanitary sewers, water conduction and distribution lines, and other similar utilities in substantial compliance with a site plan duly approved by all required duly constituted governmental authorities. The Trustees are hereby authorized and directed, without the necessity of joinder

by the holder or holders of the notes secured hereby, to execute, acknowledge and deliver such proper deed or deeds of subordination as, from time to time, may be presented by the party of the first part, his successors and assigns.

The said party of the first part covenants and agrees to pay the debt hereby secured and the interest thereon, when and as the same shall become due and payable, according to the provisions of the notes hereby secured or the provisions of this Deed of Trust, to pay all principal and interest on any prior trusts as therein provided, when and as the same shall become due and payable, to pay all taxes and assessments charged against said land and premises during the continuance of this trust, when and as the same may become due and payable, and to keep the improvements thereon insured against all hazards in some responsible insurance company for such amount and in such company or companies as the trustee or trustees acting hereunder may elect, in a sum equal to the value of buildings thereon, and

to assign the same, and the same hereby is assigned, to the trustee for the benefit of this trust, and any amount received from said insurance shall be applied in the reduction of the debt hereby secured whether the same be due or not. Upon default in the payment of said indebtedness or the payment on any prior deed of trust, taxes or assessments, when and as the same shall become due and payable, or to so insure, the noteholder may make such payments or pay such charges and such payments and expenses thereof shall be an interest bearing charge secured hereby and shall be subject to all the provisions of this Deed of Trust in case of default or other breach of any covenant herein contained.

The said party of the first part, in order to secure further the payment of said indebtedness and the interest thereon, hereby assigns to the holder of the said indebtedness all of the rents that may from time to time become due and payable on account of any lease now existing or that may hereafter come into existence

in respect to the above described real estate, and it is hereby covenanted and agreed between the parties hereto that the holder of the said indebtedness is hereby fully authorized and empowered in his discretion to collect all such rents and all money so received under this assignment shall be applied in reduction of said indebtedness, after first deducting therefrom such reasonable costs and expenses, including attorney's fees, court costs, and such other reasonable items of expense as may be incurred in and about the collection of said rents, provided, however, that this assignment of rents shall not become effective until there shall be default in the payment of the said indebtedness or a default in one of the other covenants contained herein.

The said party of the first part further covenants that upon default being made in the payment of any note or notes hereby secured, or any installment of interest thereon, or any installment of principal or interest on any prior deeds of trust, when and as the same shall become due

and payable, or upon failure to pay when due any such taxes or assessments as shall be charged against said land and premises during the continuance of this Deed of Trust, or upon a failure to insure where required, or upon failure to pay, within five days after demand, to any holder or holders of any note or notes hereby secured, or any extensions or renewals thereof any amount which he may have advanced, paid or incurred for or on account of such principal, interest, taxes, assessments, insurance premiums or other proper charge, as herein provided, then and in either of said events, the whole of the debt hereby secured shall become immediately due and payable, and at the option and upon the request of the holder of any of the notes hereby secured, the trustee or trustees acting hereunder shall sell the land and premises hereby conveyed at public auction for cash, after advertising the time, terms and place of sale by publication once a week for four successive weeks in some newspaper having a general circulation in the County or City wherein the

property hereby conveyed is situated, and shall convey the same, upon compliance with the terms of sale, to and at the cost of the purchaser thereof, who shall not be required to see to the application of the purchase money, and out of the proceeds of sale, FIRST, to pay all proper costs, charges, and expenses, including but not limited to reasonable attorneys fees, all taxes, assessments, and insurance premiums paid by any party hereby secured, or that are unpaid and to retain as compensation a commission of five per centum of the selling price or $150.00, whichever is greater; SECONDLY, to pay pro rata on each note theretofore paid whatever may then remain unpaid of the said indebtedness, and any sums advanced by the holder or holders thereof to protect the same as aforesaid, and the interest thereon, if any, and LASTLY, to pay the remainder, if any, to the said party of the first part, his executors, administrators, successors or assigns. It is further agreed that if the said property shall be advertised for sale as herein provided and not sold, the trustee acting in execution of this Deed

of Trust shall be entitled to one-half of the commission above provided, to be computed on the amount of the debt hereby secured, plus the expense of such advertisement and reasonable expenses incident thereto, which are hereby secured in like manner as other charges and expenses. In the event of sale hereunder the trustee acting in execution of this Deed of Trust may require a deposit by the purchaser of ten percent of the amount of the sale price.

The party of the first part hereby waives his Homestead Exemption as to all the obligations hereby secured.

The irrevocable power to appoint a substitute trustee or trustees is hereby expressly granted to the holder of the indebtedness hereby secured to be exercised at any time hereafter, and from time to time, without notice and without specifying any reason therefor, by filing for record in the office where this instrument is recorded a deed of such appointment. The party of the first part and the trustee or trustees herein named or that may hereafter be substituted hereunder

expressly waive notice of the exercise of of this power as well as any requirement for application to any court for the removal, appointment or substitution of any trustee hereunder.

Notwithstanding anything herein appearing to the contrary, either Trustee or Substitute Trustee may act alone in the premises.

Upon payment of the debt hereby secured and the interest thereon, and all other proper costs, charges and expenses as herein provided, the trustee shall release and reconvey said land and premises to the party of the first part or the person entitled thereto, at the latter's own cost and expense.

Whenever in this instrument the context so requires, the masculine gender includes the feminine and/or neuter, the singular number includes the plural, and the plural number includes the singular, and the term "holder" shall include any payee of the indebtedness hereby or any transferee thereof whether by operation of law or otherwise.

WITNESS the following signature and seal:

John L. Scott, Trustee

STATE OF VIRGINIA
COUNTY OF FAIRFAX, To-Wit:

I, the undersigned, a Notary Public in and for the County and State aforesaid, whose commission as Notary expires on the ___ day of _____, 19__, do hereby certify that JOHN L. SCOTT, TRUSTEE, whose name is signed to the foregoing deed bearing date on the day of December, 1972, have acknowledged the same before me in the County and State aforesaid.

GIVEN under my hand and seal this day of December, 1972

Notary Public

APPENDIX F

IN THE SUPREME COURT OF
THE STATE OF VIRGINIA

JOHN L. SCOTT, Appellant	)	Record No. 761019 on Petition for Appeal To the Supreme Court of Virginia;
vs.	)	
JOHN D. BENN, JR. RICHARD A. BACAS, Trustee THEODORE L. GRAY, Trustee Appellees	)	Chancery No. 8370 in the Circuit Court of Prince William County, Virginia

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

I. Notice is hereby given that JOHN L. SCOTT, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of Virginia refusing Petitioner's Petition For an Appeal and affirming the Orders of the Circuit Court entered on April 23, 1975, and April 7, 1976, holding that Virginia's summary foreclosure statute does not violate the notice requirements of the due process clause of the Fourteenth Amendment to the Constitution of the United States of America; said final Order was entered on

February 24, 1977.

This appeal is taken pursuant to 28 U.S.C.A. § 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) Copy of the Amended Petition for Declaratory Judgment and for an Injunction.

(2) Copy of the Order of April 23, 1975, entered by Judge Morris.

(3) Copy of the Notice of Appeal and Assignment of Error, filed by Petitioner on May 21, 1975.

(4) Copy of the Petition for Appeal, filed on August 19, 1975.

(5) Copy of the Order of the Supreme Court of Virginia, entered on February 2, 1976, refusing the Petition for Appeal and dismissing the appeal without prejudice.

(6) Copy of the Order of April 7, 1976, entered by Judge Morris.

(7) Copy of the Notice of Appeal and Assignment of Error filed by Petitioner

on the 22nd day of April, 1976.

(8) Copy of the second Petition for Appeal, filed on August 9, 1976.

(9) Copy of the Order of the Supreme Court of Virginia, entered on the 24th day of February, 1977, rejecting and refusing the Petition for Appeal, and affirming the Order of the Circuit Court.

III. The following question is presented by the appeal:

Did the Supreme Court of Virginia err in affirming the lower Court's holding that V.C.A. Section 55-59(6), as amended, does not contravene the due process clause of the Fourteenth Amendment of the Constitution of the United States of America insofar as said due process clause extends to notice requirements in a summary foreclosure proceeding to all persons with property rights in the common property secured by a Deed of Trust, or Deeds of Trust, including persons who may be liable for the debt, and also including the respective rights of senior lienholders, junior lienholders, resident and non-resident and also as to the respective rights of parties holding notes of equal dignity

secured by the same Deed of Trust?

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PROOF OF SERVICE

I, Janet Stringer, a stenographer in the Law Offices of John L. Scott and Rose F. Thompson, attorney of record for the appellant herein, depose and say that on the 22nd day of March, 1977, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the appellees herein, John D. Benn, Jr., Richard A. Bacas, Trustee, and Theodore L. Gray, Trustee, by delivering the same to Joanne D. Owens, a secretary in the offices of Henry S. Clay, Jr., counsel of record for said appellees, located at 6627 Backlick Road, Springfield, Virginia 22150.

Subscribed and sworn to before me at Springfield, Virginia, this 22nd day of March, 1977.

Bette Rae Bevan
Notary Public

My commission expires: June 7, 1978